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Superior

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946 47

No. 967 38

JOSEPH F. MAGGIO, PETITIONER,

vs.

RAYMOND ZEITZ, AS TRUSTEE IN BANKRUPTCY
OF LUMA CAMERA SERVICE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 31, 1947.

CERTIORARI GRANTED MARCH 10, 1947.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

**IN UNITED STATES CIRCUIT COURT OF APPEALS,
SECOND CIRCUIT**

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt;
JOSEPH F. MAGGIO, Appellant; RAYMOND ZEITZ, Trustee-
Appellee

STATEMENT UNDER RULE XIII

This proceeding, to punish the appellant for contempt, was commenced by the service on the appellant of the Petition and Order to Show Cause on or about December 8th, 1944. The matter came on to be heard on April 10, 1945, before Hon. Samuel Mandelbaum, D. J., and resulted in an order, dated April 30, 1945, granting the application, from which this appeal is taken.

Max Schwartz, as successor of Duberstein & Schwartz, Esqs., 26 Court Street, Brooklyn, N. Y., appears for the appellant.

Glass & Lynch, Esqs., 170 Broadway, New York City, appear for the appellee.

There has been no change of parties or attorneys except that the appellant is now represented by Max Schwartz, the successor of the firm of Duberstein & Schwartz, his former attorneys.

[fol. 2] IN UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt.

ORDER TO SHOW CAUSE

(To Punish Joseph F. Maggio, for Contempt, etc.)

Upon the annexed petition of Raymond Zeitz, Trustee in Bankruptcy herein, duly verified the 7th day of December, 1944, the certificate of contempt of Honorable Oscar W. Ehrhorn, Referee in Bankruptcy, the petition and exhibits thereto annexed, all on file with the Clerk of this court, upon the turnover order of said Referee dated August 9, 1943, upon the order of Honorable Vincent L. Leibell, dated De-

ember 28, 1943, affirming in all respects the order of said Referee, upon the mandate of the United States Circuit Court of Appeals, for the Second Circuit, dated November 13, 1944, affirming the said order of the District Court, upon the order on said mandate dated November 28, 1944, all of which papers are on file in the Office of the Clerk of this court, and upon the record of all proceedings had herein.

Let Joseph F. Maggio show cause before me or a Judge of this Court, at a Bankruptcy Motion Part thereof, to be held at the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 13th day of December, 1944, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made and entered punishing the said [fol. 3] Joseph F. Maggio for contempt of Court for wilfully disobeying or failing to comply with the order made herein by the said Referee in Bankruptcy dated August 9, 1943, as affirmed by the order of Honorable Vincent L. Leibel, dated December 28, 1943, as further affirmed by the mandate of the United States Circuit Court of Appeals, for the Second Circuit, dated November 13, 1944, in that said Joseph F. Maggio failed to turn over and deliver to the Trustee herein certain merchandise in his possession or under his control, consisting of photographic equipment and supplies of the class and description commonly purchased and dealt in by the bankrupt in the regular course of its business in the amount and value of \$17,500 or the proceeds thereof, as required by said order, and for wilfully prejudicing, impeding and impairing the rights of the creditors and Trustee herein, and why an order should not be made committing the said Joseph F. Maggio until he shall turn over and deliver to the Trustee herein the aforementioned property or proceeds thereof, and granting to the Trustee such other, further and different relief as may be just and proper in the premises.

Let service of a copy of this order to show cause upon Joseph F. Maggio or his attorney on or before the 8th day of December, 1944, be deemed good and sufficient service.

Dated, New York, N. Y., December 7, 1944.

William Bondy, United States District Judge.

[fol. 4] IN UNITED STATES DISTRICT COURT

PETITION

To the Honorable Judges of the United States District Court, for the Southern District of New York:

The petition of Raymond Zeitz respectfully alleges:

1. That he is the Trustee herein, duly qualified and acting as such.

2. That after due notice and hearing, a turnover order directed to Joseph F. Maggio, President of the bankrupt, was duly made on August 9, 1943 by Honorable Oscar W. Ehrhorn, Referee in Bankruptcy, a true copy of which order is annexed hereto and marked Exhibit "A", the original of which is on file with the Clerk of this Court.

3. That in substance, the said order of August 9, 1943 ordered and directed the said Joseph F. Maggio, within ten days after service upon him of a certified copy of said order, to turn over and deliver to the Trustee herein merchandise belonging to the bankrupt estate of the amount and value of \$17,500, consisting of photographic equipment and supplies of the class and description commonly purchased and dealt in by the bankrupt in the regular course of its business, or the proceeds of the sale of said merchandise.

4. That thereafter and on August 16, 1943, a certified copy of said turnover order was served on the said Joseph F. Maggio, as appears from the affidavit of Ben Bassin, a copy of which is annexed hereto and marked Exhibit "B", the original of which is on file with the Clerk of this Court.

5. That thereafter the respondent, Joseph F. Maggio, filed a petition for review of the turnover order of Referee Oscar W. Ehrhorn and on December 28, 1943, Vincent L. [fol. 5] Leibell, United States District Judge, made an order affirming the said turnover order and denying the petition for review. A true copy of said order is annexed hereto and marked Exhibit "C", the original of which is on file with the Clerk of this court.

6. That thereafter, the respondent, Joseph F. Maggio, appealed to the Circuit Court of Appeals for the Second Circuit, from the said order of the District Court and on November 13, 1944, a mandate of that Court was issued ordering that the order of the District Court be affirmed.

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On November 28, 1944, an order was signed by Honorable John Bright, United States District Judge, and entered in the Office of the Clerk of this Court, making the mandate of the Circuit Court the order and judgment of the District Court. A copy of said order is annexed hereto and marked Exhibit "D".

7. That on December 4, 1944, Referee Oscar W. Ehrhorn signed a certificate of contempt in which he certified that said Joseph F. Maggio has failed to comply with the turnover order of the Referee dated August 9, 1943 and recommended that said Joseph F. Maggio be punished for contempt for failure to comply with said order. The original certificate of contempt and the petition and exhibits annexed thereto are on file with the Clerk of this court. Annexed hereto are true copies of the certificate of contempt marked Exhibit "E" and of the petition for said certificate marked Exhibit "F".

8. That said Joseph F. Maggio has wholly failed to comply with the said turnover order of the Referee dated August 9, 1943, as affirmed by the United States District Court and the Circuit Court of Appeals, for the Second Circuit, and is wilfully prejudicing, impairing and impeding the [fol. 6] rights of the creditors and the Trustee herein, and is wilfully and deliberately disobeying the orders of this Court.

9. That said Joseph F. Maggio has appeared by counsel throughout the proceedings hereinbefore mentioned and was represented on the petition to review before Judge Leibell and on the appeal to the Circuit Court of Appeals by Duberstein & Schwartz, Esqs., 26 Court Street, Brooklyn, New York.

10. That no previous application has been made for the relief herein sought.

Wherefore, your petitioner respectfully prays for an order committing the said Joseph F. Maggio for contempt of Court until he shall have complied with the aforesaid turnover order.

Dated, New York, N. Y., December 7, 1944.

(Sgd.) Raymond Zeitz, Trustee-Petitioner.

(Verified December 7, 1944.)

[fol. 7] EXHIBIT "A" TO PETITION

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

In Bankruptcy

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt

(No. 80681)

SIR:

Please take notice, that an order of which the within is a true copy will be presented for settlement and signature herein to Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, at his office at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York, on the 2nd day of August, 1943, at ten o'clock in the forenoon.

Dated, New York, N. Y., July 29, 1943.

Yours, etc., Glass & Lynch, 170 Broadway, Borough of Manhattan, City of New York; Benjamin H. Wicksel, 345 Madison Avenue, Borough of Manhattan, City of New York, Attorneys for Trustee.

To: Abraham Burstein, Esq., Attorney for Respondent, Joseph F. Maggio, 295 Madison Avenue, New York, N. Y.

[fol. 8]

(Turnover Order)

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW
YORK

In Bankruptcy

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt

(No. 80681)

At New York, in the aforesaid District, on the 9th day of August, 1943.

The Trustee herein having made due application to this Court by order to show cause dated January 18, 1943 for an order requiring the respondent, Joseph F. Maggio, to turn over and surrender to said Trustee certain merchandise

belonging to the estate of the bankrupt, or the proceeds of the sale thereof, and said application having duly come on to be heard before me on May 18th, 1943 and June 4th, 1943.

Now, on reading and filing said order to show cause and the petition of Raymond Zeitz, the Trustee herein, verified January 7th, 1943, thereto annexed, the answer of the respondent verified May 17th, 1943 and the testimony adduced by both parties on the return of said order to show cause; and after hearing Glass & Lynch and Benjamin H. Wickse, attorneys for the Trustee; in support of said application and Abraham Burstein, attorney for the respondent, in opposition thereto; and due deliberation having been had [fol. 9] thereon; and on filing the Findings of Fact and Conclusions of Law dated August 9th, 1943, and the memorandum of the undersigned Referee dated July 16th, 1943, and it appearing to my satisfaction that the Trustee established by clear and convincing evidence that the merchandise hereinafter described, belonging to the estate of the bankrupt, was knowingly and fraudulently concealed by the respondent from the Trustee herein and that said merchandise is now in the possession or under the control of the respondent, it is, on motion of Glass & Lynch and Benjamin H. Wickse, attorneys for the Trustee,

Ordered, that the Trustee's said application be, and the same hereby is granted to the extent hereinafter set forth; and it is further

Ordered, that Joseph F. Maggio, the respondent herein, be and he hereby is ordered and directed, within ten (10) days after service upon him of a certified copy of this order, to turn over and deliver to Raymond Zeitz, the Trustee herein, merchandise belonging to the bankrupt estate of the amount and value of \$17,500, consisting of photographic equipment and supplies of the class and description commonly purchased and dealt in by the bankrupt in the regular course of its business, or the proceeds of the sale of said merchandise.

Oscar W. Ehrhorn, Referee in Bankruptcy.

[fol. 10]

EXHIBIT "B" TO PETITION

(Affidavit of Service of Certified Copy of Turnover Order)

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt

(Joseph F. Maggio, Respondent)

STATE OF NEW YORK,
County of New York, ss:

Ben Bassin, being duly sworn, deposes and says that he is over the age of 21 years. And that on the 16th day of August, 1943 at 161-40 Normal Road, Jamaica, New York, he served the annexed turnover order upon Joseph F. Maggio, the respondent herein, by delivering to and leaving a certified copy thereof with said Joseph F. Maggio.

Deponent further says, that he knew the person so served as aforesaid to be the person mentioned and described in the said order.

Deponent is not a party to the action.

Ben Bassin.

Sworn to before me this 24th day of August, 1943.
George E. McMullen, Notary Public, Kings County.

[fol. 11]

EXHIBIT "C" TO PETITION

(Order Affirming Referee Ehrhorn's Turnover Order of August 9, 1943 and Denying Petition for Review)

At a Bankruptcy Motion Term of the United States District Court, Held in and for the Southern District of New York, at the United States Courthouse, Foley Square, Borough of Manhattan, New York City, on the 28th Day of December, 1943

Present: Hon. Vincent L. Leibell, United States District Judge.

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt

Joseph F. Maggio, President of the Bankrupt, having petitioned this Court for a review of an order made in these proceedings by Referee Oscar W. Ehrhorn, dated August

9, 1943, which directed said Joseph F. Maggio to turn over to the Trustee in Bankruptcy herein merchandise belonging to the bankrupt estate of the amount and value of \$17,500, consisting of photographic equipment and supplies of the class and description commonly purchased and dealt in by the Bankrupt in the regular course of its business, or the proceeds of the sale of said merchandise, and the said petition for review having duly come on to be heard before me on the 24th day of November, 1943, and after hearing Duberstein & Schwartz, by Max Schwartz, in support of the [fol. 12] petition to review, and Glass & Lynch and Benjamin W. Wicksel, attorneys for the Trustee, by Bernard Alpert, in opposition thereto, and due deliberation having been had thereon,

Now, upon reading and filing the petition to review of Joseph F. Maggio, dated and verified the 19th day of August, 1943, the order of Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, dated August 9th, 1943, the certificate on review of said Referee, dated August 24th, 1943 and filed, and upon all the proceedings had before the said Referee, as appears from his said certificate, and upon reading and filing the opinion of this Court, dated December 13th, 1943,

Now, on motion of Glass & Lynch and Benjamin H. Wicksel, attorneys for the Trustee, it is <

Ordered, that the said petition for review filed by Joseph F. Maggio be, and the same hereby is denied and dismissed and the order of Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, dated August 9th, 1943, be, and the same hereby is in all respects affirmed.

Vincent L. Leibell, U. S. D. J.

[fol. 13]

EXHIBIT "D" TO PETITION

(JUDGMENT)

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt

JOSEPH F. MAGGIO, Respondent-Appellant,

against

RAYMOND ZEITZ, Petitioner-Appellee

Joseph F. Maggio, having appealed to the United States Circuit Court of Appeals, for the Second Circuit, from an order made herein dated December 28, 1943 and entered in the Office of the Clerk of the United States District Court, for the Southern District of New York, on that day, confirming, upon a appellant's petition for review, an order of Referee Oscar W. Ehrhorn directing appellant to turn over to the Trustee-Appellee certain merchandise or the proceeds thereof, cash, and certain books and records of the bankrupt, and said Court having issued its mandate dated November 13, 1944, wherein it was ordered, adjudged and decreed that such order of said District Court be affirmed with costs, assessed in the sum of \$31.45 in favor of Raymond Zeitz, as Trustee-Appellee.

Now, on motion of Glass & Lynch and Benjamin H. Wicksel, attorneys for Raymond Zeitz, as Trustee-Appellee, and upon the mandate of the United States Circuit Court of [fol. 14] Appeals, for the Second Circuit, dated November 13, 1944, it is hereby Ordered, Adjudged and Decreed:

1. That the mandate in this cause of the United States Circuit Court of Appeals, for the Second Circuit, dated November 13, 1944 and filed in the Office of the Clerk of the United States District Court, for the Southern District of New York, be, and the same hereby is made the judgment and order of this Court; and

2. That Raymond Zeitz, as Trustee-Appellee, have judgment against Joseph F. Maggio for the sum of \$31.45 costs, as taxes herein.

Dated, New York, N. Y., November 28, 1944.

Approved,

John Bright, U. S. D. J.

EXHIBIT "E" TO PETITION

(Referee's Certificate of Contempt)

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORKIn the Matter of LUMA CAMERA SERVICE, INC., Bankrupt
(No. 80681)

I, Oscar W. Ehrhorn, one of the Referees in Bankruptcy of this Court, respectfully report and certify that on August [fol. 15] 9th, 1943, I made an order requiring Joseph F. Maggio to turn over and deliver to the Trustee in Bankruptcy in this proceeding, within ten (10) days after service of a certified copy of said order upon him, certain merchandise belonging to the bankrupt estate of the amount and value of \$17,300, consisting of photographic equipment and supplies of the class and description commonly purchased and dealt in by the bankrupt in the regular course of its business, or the proceeds of the sale of said merchandise. All of said merchandise or the proceeds thereof are in the possession or under the control of said Joseph F. Maggio, as appears from the testimony on file and the proceedings had herein. A copy of said order, the petition of Raymond Zeitz, Trustee, duly verified, and the affidavit of Ben Bassin, verified the 24th day of August, 1943, are filed herewith and made part hereof.

I further certify that said Joseph F. Maggio has wholly failed to comply with said order.

I further find that said Joseph F. Maggio is in contempt of Court and therefore recommend that he be punished for contempt until he shall have turned over and delivered to the Trustee in Bankruptcy herein, certain merchandise belonging to the bankrupt estate of the amount and value of \$17,500, consisting of photographic equipment and supplies of the class and description commonly purchased and dealt in by the bankrupt in the regular course of its business, or the proceeds of the sale of said merchandise.

All of which is respectfully submitted.

Dated, New York, N. Y., December 4, 1944.

Oscar W. Ehrhorn, Referee in Bankruptcy.

[fol. 16] EXHIBIT "F" TO PETITION
(Petition for Certificate of Contempt)

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt
(No. 80681)

To Hon. Oscar W. Ehrhorn, Referee in Bankruptcy:

The petition of Raymond Zeitz respectfully shows and alleges:

1. That he is the Trustee herein, duly qualified and acting as such.

2. That heretofore by order of the Referee herein, dated August 9, 1943, Joseph F. Maggio was ordered and directed, within ten (10) days after service upon him of a certified copy of said order, to turn over and deliver to your petitioner, as Trustee herein, merchandise belonging to the bankrupt estate of the amount and value of \$17,500, consisting of photographic equipment and supplies of the class and description commonly purchased and dealt in by the bankrupt in the regular course of its business or the proceeds of the sale of said merchandise.

3. That annexed hereto is a true copy of said order.

[fol. 17] 4. As appears from the annexed affidavit of Ben Bassin, sworn to August 24, 1943, a certified copy of said order was duly served on said Joseph F. Maggio on August 16, 1943.

5. That more than ten (10) days have elapsed since said Joseph F. Maggio was served with a certified copy of said order and that said Joseph F. Maggio has failed to obey said order and has failed to turn over and deliver to your petitioner, as Trustee herein, the aforesaid merchandise or the proceeds of the sale thereof, as directed by said order, or any part thereof.

6. That thereafter and on December 28, 1943, there was filed in the Office of the Clerk of this Court the order of Judge Vincent L. Leibell dated December 28, 1943, affirming

the turnover order and denying said Joseph F. Maggio's petition for a review thereof.

7. That thereafter, said Joseph F. Maggio having appealed to the United States Circuit Court of Appeals, for the Second Circuit, from the said order of the District Court affirming the aforesaid turnover order, the Circuit Court of Appeals, for the Second Circuit, by its mandate issued November 13, 1944 and on file in the Office of the Clerk of this Court, affirmed the order appealed from; that by order of this Court dated November 28, 1944 and filed in the Office of the Clerk of this Court, the said order of the Circuit Court of Appeals has been made the order of this Court.

Wherefore, your petitioner respectfully prays for a Certificate of Contempt of said Joseph F. Maggio for failure to obey the aforesaid turnover order.

Dated, New York, N. Y., December 4th, 1944.

Raymond Zeitz, Petitioner.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF EMANUEL LINHARDT, READ IN SUPPORT OF APPLICATION

STATE OF NEW YORK,
County of New York, ss:

Emanuel Linhardt, being duly sworn, deposes and says: I am an attorney associated with the firm of Glass & Lynch, which firm, together with Benjamin H. Wicksel, are attorneys for the Trustee in Bankruptcy in the above entitled proceeding.

I submit this affidavit for the purpose of supplementing the petition of Raymond Zeitz, Trustee in Bankruptcy herein, verified December 7, 1944, in support of his application to punish Joseph F. Maggio for contempt of Court. In said Trustee's petition it is alleged that the turnover order which said Joseph F. Maggio has refused to comply with was affirmed by the United States Circuit Court of Appeals. It is noteworthy that on February 5, 1945 the Supreme

Court of the United States denied certiorari on the application made by Joseph F. Maggio for review of the turnover order in that Court.

Emanuel Linhardt.

(Sworn to the 19th day of February, 1945.)

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JOSEPH F. MAGGIO, READ IN OPPOSITION TO APPLICATION

STATE OF NEW YORK,
City of New York,
County of Kings, ss:

Joseph F. Maggio, being duly sworn, deposes and says:
I am the respondent herein.

Answering the application of Raymond Zeitz, as Trustee, I allege:

That at the time of the entry of the turnover order herein on August 9th, 1943, I was employed by E. I. DuPont de Nemours & Co., at the foot of 39th Street, Brooklyn, New York, in a clerical capacity, at a net salary of \$170 per month. At said time I was employed by the said company for two years, having commenced to work for the DuPont Company in August of 1941. I continued to work for the said company until November of 1944.

During the said period between August, 1941 and November of 1944, my sole source of income was the salary received as a result of my employment, which at no time exceeded the net sum of \$170 per month.

[fol. 20] This salary so received by me was used for the support of my family, consisting of my wife, my youngest daughter Joan, age 16, and attending high school, and my mother-in-law Mary Topping, who resides with my family at 161-40 Normal Road, Jamaica, L. I. My mother-in-law, Mary Topping, is a woman 74 years of age, and in addition thereto, is practically blind and therefore incapable of supporting herself and dependent upon me for support.

From on and after August 9th, 1943, the date of the entry of the turnover order herein, and in fact for almost two

years prior thereto, neither I, nor any member of my family, had any property or assets. All our bank accounts were closed out prior to August of 1941, and at no time did I, or any member of my family, own any stocks, bonds, mortgages, or other personal property, or any real estate, except that my wife did own the premises wherein we reside, 161-40 Normal Road, Jamaica, L. I., which is subject to mortgages and the judgment lien of the Sterling National Bank, and which encumbrances are far in excess of the realizable value of the said property.

Neither I, nor any members of my family, have any means whatsoever to satisfy the claims and demands of the Trustee, or the turnover order entered against me on August 9th, 1943.

Since November of 1944, I have not been employed and in fact, since said date I have been incapable of engaging in any employment by reason of my physical condition.

The only means of support and income that I have had since November of 1944 have been monies received by me by way of sick leave benefits from my employer for the months of November, December, 1944 and January, 1945, which ceased and were terminated on January 31st, 1945, and in addition thereto insurance benefits of \$25 a week. While I carry life insurance with disability benefits, the insurance companies have not yet recognized my claim for disability, [p. 1. 21] but when the same is recognized, I should receive by way of disability benefits \$250 per month.

For some time prior to November of 1944 I had been suffering from a heart condition which culminated in serious attacks in November of 1944, so as to completely disable me from thereafter engaging in any employment. Annexed hereto and made a part hereof is a sworn statement of Benjamin F. Maggio, M.D., my family physician, with respect to my physical condition. Since November of 1944 I have been treated by him at least twice a week and sometimes oftener.

I am perfectly willing to submit to a physical examination by any doctor employed by the Trustee, or designated by this Court, to verify and confirm the statements made by my physician respecting my physical condition.

Wherefore, I respectfully pray that the motion be denied.

Joseph F. Maggio.

(Sworn to the 16th day of February, 1945.)

[fol. 22] EXHIBIT "A" ATTACHED TO FOREGOING AFFIDAVIT

Benjamin F. Maggio, M. D., 691 Bushwick Avenue
Brooklyn, N. Y.

Feb. 9th, 1945.

This is to certify that Joseph Maggio has been under my professional care for the past 4 years for a heart complaint. During the past year, his symptoms have become greatly aggravated and since November, 1944 has given evidence of suffering from angina attacks due to serious coronary artery deficiency. The slightest exertion, even walking, has precipitated serious and dangerous heart attacks. Any emotional stress has also acted similarly. Electro cardio-gram studies of his heart have corroborated the diagnosis. This is a serious condition requiring a special and complicated regimen of diet, rest-treatment and freedom from all anxiety over a long period of time. Emotional strain particularly may cause serious consequences.

Benj. F. Maggio, M. D.

Sworn to before me this 9th day of February, 1945.
Isidore J. Bronstein, Queens Co., Notary Public;
Queens Co., Clks. No. 2501, Reg. No. 201B5. Term
Expires March 30th, 1945.

[fol. 23] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY AFFIDAVIT OF EMANUEL LINHARDT, READ IN SUPPORT
OF APPLICATION

STATE OF NEW YORK,
County of New York, ss:

Emanuel Linhardt, being duly sworn, deposes and says:

I am an attorney associated with the firm of Glass & Lynch, which firm is acting as co-counsel to the Trustee in Bankruptcy herein.

I submit this affidavit in reply to the affidavit of Joseph F. Maggio submitted in opposition to the motion made by said Trustee in Bankruptcy to punish said Joseph F. Mag-

gio for contempt of court for failure to comply with the turnover order made by the Referee in Bankruptcy and confirmed in this Court, the Circuit Court of Appeals, and the Supreme Court of the United States.

Said answering affidavit is manifestly insufficient on its face and sets forth no facts which would warrant this Court in extending to said Joseph F. Maggio any further consideration for his refusal to comply with said turnover order. The facts set forth in said answering affidavit with respect to the earning power of the respondent are wholly [fol. 24] immaterial and irrelevant to the issues raised by the instant motion. It has been determined in all Courts that the respondent has refused to turn over merchandise having a value of \$17,500. The respondent has improperly and wrongfully appropriated said merchandise according to the findings of the Referee in Bankruptcy, and he should be required to restore the same to the Trustee in Bankruptcy or suffer the consequences of his contumacious disregard for the orders of the Referee in Bankruptcy and of this Court.

The additional ground set forth in the answering affidavit in opposition to said motion concerning the physical condition of the said Joseph F. Maggio is likewise utterly insufficient on its face. There is submitted a brief statement by one Benjamin F. Maggio, M. D. that Joseph F. Maggio has been under his professional care for a "heart complaint". No effort has been made to corroborate the alleged "heart complaint" by the independent findings of a wholly disinterested heart specialist. At the very least this requirement should be met by the respondent, such examination to be made by a specialist designated by the Court at respondent's expense.

Wherefore, it is respectfully prayed that this motion be granted and the respondent, Joseph F. Maggio, committed for contempt of court until he shall have complied with said turnover order.

Emanuel Linhardt.

(Sworn to the 19th day of March, 1945.)

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL AFFIDAVIT OF JOSEPH F. MAGGIO, READ IN
OPPOSITION TO APPLICATION

STATE OF NEW YORK,
City of New York,
County of Kings, ss:

Joseph F. Maggio, being duly sworn, deposes and says:

I am the respondent herein.

Supplementing my affidavit of February 16th, 1945, and for the purpose of apprising the Court of what has transpired since the argument of the motion, I allege:

After the argument of the motion and pursuant to the suggestion made in open court respecting an attempt to be made to settle the Trustee's claims, I caused to be submitted an offer to the Trustee to pay the sum of \$3,000 in settlement of the Trustee's claims against me. I was assured by friends and relatives that the said sum would be available.

As a result of negotiations between my attorneys and attorneys for the Trustee, I was advised that the offer was inadequate. I endeavored to raise the maximum amount available among all of my friends and relatives. As a result of my pleas and the efforts of my immediate family, I was assured that the maximum sum that could be raised on my behalf was the sum of \$3,500, and accordingly I instructed my attorneys to submit an offer in said sum to the attorneys for the Trustee. This sum was to be paid in cash upon the acceptance of the offer of compromise and settlement.

[fol. 26] I have just been advised that this offer has been rejected and that no offer of compromise in any sum other than payment in full of the Trustee's claims will be accepted.

I have done the utmost within the means of myself, my family, and friends, to affect an adjustment of the Trustee's claims, without success.

In view of the state of my health, I again submit that before the motion is passed upon that this Court make its own independent investigation into my physical condition,

and I reiterate that I am perfectly willing to submit to a physical examination by any doctor employed by the Trustee or designated by this Court.

Joseph F. Maggio.

(Sworn to the 20th day of March, 1945.)

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt.

(B 80681)

Appearances:

Glass & Lynch, Esqs., Attorneys for Trustee in Bankruptcy; Emanuel Linhardt, Esq., of Counsel.

Duberstein & Schwartz, Esqs., Attorneys for Respondent, Joseph F. Maggio.

OPINION

[fol. 27] MANDELBAUM, D. J.:

This is a motion by the Trustee in Bankruptcy to punish the respondent, Joseph F. Maggio, for contempt for failure to comply with an order of the Referee, to turn over to the Trustee some \$17,500 in photographic equipment belonging to the bankrupt estate, or the proceeds of the sale of said merchandise.

The turnover order has been affirmed by the District Court and the Circuit Court of Appeals of this Circuit.

The respondent, in his affidavits in opposition to this contempt motion, alleges that he did not have the assets in his possession at the time of the turnover order. However, the turnover order conclusively determines that when it is entered the respondent has possession of the assets, "and no evidence can properly be considered on a motion for commitment for contempt, except that which tends to show inability on the part of the bankrupt to comply with the order because of something which has taken place since the order was made." *In re Siegler*, C. C. A. 2nd, 31 F. [2d] 972.

Respondent has not sustained his burden of satisfactorily accounting for the disposition of the assets by his mere denial of possession under oath.

FINDINGS OF FACT

1. On August 9th, 1943, the Referee in Bankruptcy made an order requiring Joseph F. Maggio, to turn over and deliver to the Trustee in this proceeding, within 10 days of service of a certified copy of said order upon him, certain merchandise belonging to the bankrupt of the amount and value of \$17,500 consisting of photographic equipment and supplies or the proceeds of the sale of said merchandise.

2. On August 16th, 1943, a certified copy of the turnover order was duly served upon Joseph F. Maggio.

[fol. 28] 3. On December 5th, 1944, the Referee's certificate of contempt was filed in this court.

4. The respondent, Joseph F. Maggio, has wholly failed to comply with said turnover order, and he has failed to explain to the satisfaction of this court his failure to comply.

CONCLUSIONS OF LAW

1. The respondent, Joseph F. Maggio is in contempt of court.

2. Respondent is to stand committed until he complies with the turnover order or until the further order of this court.

Motion granted. Settle order on notice.

Dated, April 18th, 1945.

Samuel Mandelbaum, U. S. D. J.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt

ORDER APPEALED FROM

A motion having been made herein by Raymond Zeitz, Trustee of the above-named bankrupt, to punish the respondent, Joseph F. Maggio, for contempt of court in having

disobeyed the lawful order of Hon. Oscar W. Ehrhorn, [fol. 29] Referee in Bankruptcy, dated August 9, 1943 directing the respondent to turn over to the Trustee herein certain merchandise belonging to the bankrupt estate of the amount and value of \$17,500, consisting of photographic equipment and supplies, or the proceeds, of the sale of said merchandise as required by said order, and said motion having duly come on for hearing before this Court on the 10th day of April, 1945, and on reading and filing the order to show cause dated December 7, 1944, the petition of Raymond Zeitz, Trustee herein verified December 7, 1944, and the exhibits thereto annexed, the affidavit of Emanuel Linhardt sworn to February 19, 1945, and the reply affidavit of Emanuel Linhardt sworn to March 19, 1945, in support of said motion, and the affidavit of Joseph F. Maggio, sworn to March 16, 1945, and the further affidavit of Joseph F. Maggio, sworn to March 20, 1945, in opposition thereto, the turnover order of the said Referee dated August 9, 1943, the affidavit of Ben Bassin, sworn to August 24, 1944 of personal service of said turnover order upon the said Joseph F. Maggio, the order of Hon. Vincent L. Leibell, dated December 28, 1943, affirming in all respects the order of said Referee, the mandate of the United States Court of Appeals for the Second Circuit, dated November 13, 1944, affirming the said order of the District Court, the order on said mandate, dated November 28, 1944, and the certificate of Hon. Oscar W. Ehrhorn, Referee in Bankruptcy dated December 4, 1944, filed on December 5, 1944 and the opinion, Findings of Fact and Conclusions of Law of Hon. Samuel Mandelbaum dated April 18, 1945, and due deliberation having been had thereon, and after hearing Glass & Lynch, attorneys for the Trustee, by Emanuel Linhardt of counsel in support of said motion and Duberstein & Schwartz, attorneys for the respondent Joseph F. Maggio, by Max Schwartz of counsel, in opposition thereto, and it appearing to the satisfaction of this Court that the respondent, Joseph F. Maggio, has failed and refused and still fails and [fol. 30] refuses to comply with the terms of said turnover order dated August 9, 1943.

Now, on motion of Glass & Lynch, attorneys for said Trustee, it is hereby

Ordered, Adjudged and Decreed, that the said motion be, and the same hereby is in all respects granted; and it is further

Ordered, Adjudged and Decreed, that the respondent, Joseph F. Maggio is guilty of a contempt of this Court in having wilfully prejudiced, impeded and impaired the rights of the Creditors and Trustee in Bankruptcy herein, in having wilfully and deliberately disobeyed said lawful order of said Referee in Bankruptcy and in neglecting and refusing as in said order directed, to turn over to said Trustee certain merchandise in the amount and value of \$17,500, or the proceeds thereof, now in his possession and under his control; and it is further

Ordered, Adjudged and Decreed, that the respondent, Joseph F. Maggio, be forthwith committed to the Federal Detention Headquarters, 427 West Street, City, County and State of New York, to be there confined and detained for his contempt in failing to comply with the terms of the afore-said order; and it is further

Ordered, Adjudged and Decreed, that the United States Marshal for the Southern District of New York, be, and hereby is ordered and directed to forthwith apprehend the above named respondent and detain him in the Federal Detention Headquarters, 427 West Street, City, County and State of New York until the above named respondent shall have purged himself of such contempt by complying with said turnover order, or until the further order of this Court; and it is further

[fol. 31] Ordered, Adjudged and Decreed, that in the alternative the respondent may purge himself of the afore-said contempt by forthwith turning over to said Trustee the said merchandise in the amount and value of \$17,500, or the proceeds thereof, belonging to his estate and found to be in his possession or under his control.

Dated: New York, N. Y., April 30, 1945.

Samuel Mandelbaum, U. S. D. J.

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

Sir:

Please take notice that Joseph F. Maggio, the respondent herein, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from an order entered

June 5th, 1945, in the United States District Court for the Southern District of New York (Hon. Samuel Mandelbaum, D. J.), insofar as said order adjudges Joseph F. Maggio, [fol. 32] the respondent, guilty of contempt of Court, and directs that he be committed to the Federal Detention Headquarters, 427 West Street, City, County and State of New York, and be there confined and detained until he shall have purged himself of contempt and shall have complied with the turnover order dated August 9th, 1943, and that he may purge himself by turning over to Raymond Zeitz, Trustee, merchandise in the amount and value of \$17,500, or the proceeds thereof.

Dated: Brooklyn, N. Y., June 11th, 1945.

Yours, etc., Duberstein & Schwartz, Attorneys for
Joseph F. Maggio, Respondent, 26 Court Street,
Brooklyn, New York.

To: Glass & Lynch, Esqs., Attorneys for Trustee, 170
Broadway, New York City.

[fol. 33] IN UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

LUMA CAMERA SERVICE, INC., Bankrupt; JOSEPH F. MAGGIO,
Appellant; Raymond Zeitz, Appellee

STIPULATION DESIGNATING CONTENTS OF RECORD

It is hereby stipulated and agreed, by and between the attorneys for the respective parties, that the following constitutes the record on appeal herein:

1. Order to show cause, granted December 7th, 1944, and petition of Raymond Zeitz, as Trustee, in support thereof, verified December 7th, 1944.

(a) Exhibits annexed to petition, consisting of Exhibits A, B, C, D, E and F.

2. Affidavit of Emanuel Linhardt, sworn to February 19th, 1945.

3. Reply affidavit of Emanuel Linhardt, sworn to March 19th, 1945.

4. Affidavit in opposition of Joseph F. Maggio, sworn to February 16th, 1945, and exhibit annexed thereto.

[fol. 34] 5. Supplemental affidavit of Joseph F. Maggio, sworn to March 20th, 1945.

6. Opinion of Judge Samuel Mandelbaum, of April 18th, 1945.

7. Order of Judge Samuel Mandelbaum dated April 30th, 1945 and entered June 5th, 1945.

8. Notice of appeal, dated June 11th, 1945.

Dated: Brooklyn, New York, March 30, 1946.

Max Schwartz, Attorney for Appellant. Glass & Lynch, by Sidney Freiberg, Attorneys for Appellee.

[fol. 35] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed that the foregoing is a true and correct transcript of the record of the said District Court in the above entitled action, as agreed on by the parties.

Dated: New York, April , 1946.

Max Schwartz, as successor of Duberstein & Schwartz, Attorneys for Appellants. Glass & Lynch, Attorneys for Appellee.

[fol. 36] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 37] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT, OCTOBER TERM, 1946

No. 31

(Argued October 11, 1946. Decided November 11, 1946)

Docket No. 20284

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt;
JOSEPH F. MAGGIO, Appellant; RAYMOND ZEITZ, Trustee-
Appellee

Before L. Hand, Swan and Frank, Circuit Judges

Appeal from an order of the United States District Court
for the Southern District of New York, adjudging appellant
in contempt. Affirmed.

[fol. 38] Max Schwartz, for appellant.

Glass & Lynch and Benjamin H. Wicksel (Leslie Kirsch
and Sidney Freiberg, of counsel) for appellee.

On April 23, 1942, Luma Camera Service, Inc., a corporation engaged in the business of selling photographic equipment and supplies, was adjudicated a bankrupt on an involuntary petition. Appellant Maggio had been its president, director, stockholder, the principal active officer, and the manager of the bankrupt, and dominated and controlled it. On January 18, 1943, the trustee in bankruptcy, seeking a turnover order, filed a petition which alleged that in 1941 Maggio had taken a considerable amount of the company's merchandise and still had them in his possession. Hearings pursuant to this petition were held before the referee in April 1943. At these hearings, Maggio testified that he had never taken any merchandise or other assets of the bankrupt. On the basis of evidence, consisting largely of the bankrupt's books and accounts, the referee inferred, and on August 9, 1943, found, an unexplained shortage of merchandise with a value of \$17,500 in November and December 1941. The referee also then found as a fact that Maggio had taken it in November and December 1941, and had fraudulently concealed it from the trustee. Although no evidence was offered that Maggio still pos-

sessed it on August 9, 1943, the referee further found as a fact that he then did. He entered an order on the same day, August 9, 1943, directing Maggio to turn over to the trustee such merchandise, "consisting of photographic equipment and supplies of the class and description commonly dealt in by the bankrupt."

[fol: 39] On petition to review, the district judge, by an order of December 28, 1943, affirmed the referee's order. See opinion in 57 F. Supp. 632. On appeal, this court affirmed without opinion; see 145 F. (2d) 241 (C. C. A. 2). Certiorari was denied; 324 U. S. 841.

On December 4, 1944, the referee, ex parte, certified that Maggio was in contempt for failure to comply with the turnover order. On petition of the trustee, the district court, on June 5, 1945, entered an order (dated April 30, 1945), adjudging Maggio guilty of contempt for wilfully and deliberately disobeying the order and committed him to jail, to be there confined and detained until he should have purged himself of the contempt by turning over to the trustee the merchandise valued at \$17,500 (or the proceeds thereof) or until further order of the court.

In the turnover hearings in April 1943, the only evidence on the question of Maggio's ability to surrender the merchandise or its proceeds (other than Maggio's denial that he had never taken the merchandise) was his testimony that neither he nor members of his immediate family had any assets of value, and that, since the bankruptcy proceedings began, he had been working on defense jobs in a clerical capacity at a small salary. In connection with the proceedings to punish for contempt, the only additional evidence was Maggio's affidavit that he had continued to work until November 1944 for a salary of \$170 a month and that the salary had been used for the support of his family which included two dependents, but that since that time he had not been employed because of bad health, having, for a short time, received small sick leave and insurance benefits. In that affidavit, Maggio said that, for some time before November 1944, he had been suffering from a serious heart condition which had culminated in series of heart [fol: 40] attacks in November 1944, so as to completely disable him, that he had been treated at least twice a week and sometimes oftener by a family physician, Dr. Benjamin F. Maggio, and that he would submit to physical examinations by any doctor employed by the trustee or designated

by the court. He also stated in the affidavit that, through friends and relatives he had been able to raise the sum of \$3500 which he had offered to the trustee in settlement of all the trustee's claims against him; that this was the maximum amount he could thus raise; that he had no funds of his own available; but that the trustee had rejected his offer. To this affidavit was attached an affidavit by Dr. Maggio to the effect that the bankrupt had a serious heart complaint, that the slightest exertion would precipitate serious and dangerous heart attacks, and that the bankrupt's condition required a special and complicated regimen of diet and rest treatment and freedom from all anxiety over a long period of time. No physical examination of Maggio was made on behalf of the trustee or on the direction of the judge, nor was any hearing held to determine appellant's physical condition.

From the contempt order entered June 5, 1945, he appeals. He asks that the order be reversed and the proceedings remanded with directions that there be (1) a hearing as to his present ability to comply with the turnover order of August 9, 1943, and (2) an examination of his physical condition to determine whether imprisonment would be harmful to his health.

FRANK, Circuit Judge:

1. To obtain the turnover order, the trustee had the burden of proving, by "clear and convincing evidence,"¹ [fol. 41] these two facts: (a) That Maggio wrongfully took (i. e., stole) the merchandise in November and December 1941, and (b) that he still possessed it, or its proceeds, when the referee entered that order one year and nine months later, in August 1943. With respect to the first, the trustee showed the shortage which occurred at the end of 1941; there was sufficient evidence to support the referee's finding as to that fact *et. c.*, the finding was not "clearly erroneous"). The trustee offered no evidence to prove the second fact. To sustain his burden of showing, by "clear and convincing evidence," that Maggio still had possession, the trustee relied on the following reasoning: The shortage, having established the theft, at the end of 1941, also established Maggio's possession twenty-one months later; for

¹ *Oriel v. Russell*, 278 U. S. 358, 362.

the stealing raised a "presumption" that he then continued to retain the goods or their proceeds, and it was therefore up to Maggio to prove otherwise, which he did not do:

Were this a case of first impression involving the validity of a turnover order, we would not accept such reasoning. A "presumption"—an inference—that a state of facts once existing continues to exist is often sound, because in accord with common sense. But all the circumstances of a case like this render the inference here highly unreasonable, since it contradicts any common-sensible interpretation of ordinary human motivations. Indeed, accepting the referee's finding that Maggio took the merchandise in 1941, the only reasonable inference is that Maggio, needing money as obviously he did, promptly disposed of the cameras and camera equipment, and that he dissipated the cash proceeds long before the expiration of the twenty-one months when the turnover order was entered (and even long before the commencement of the turnover proceedings in April 1943, some eighteen months after the taking). In any other type of litigation, a court would reject a finding [fol. 42] based upon such an inference which flies in the face of the reasonably inferable facts. "The presumption of continued possession is only as strong as the nature of the circumstances permits. The presumption loses its force and effect as time intervenes and as circumstances indicate that the bankrupt is no longer in possession of the missing goods or their proceeds. Where the property is of the type which the bankrupt would likely dissipate such as money or saleable goods, the presumption is further weakened. Such presumption of continuing possession in bankruptcy cases is an application of a general and well recognized rule of the law of evidence. With reference to the effect of lapse of time upon this presumption, see 31 C. J. S., Evidence, §124, page 737, as follows: 'Always strongest in the beginning the inference steadily diminishes in force with lapse of time, at a rate proportionate to the quality of permanence belonging to the fact in question, until it ceases or perhaps is supplanted by a directly opposite inference.' "

² *Brune v. Fraidin*, 149 F. (2d) 325, 327 (C. C. A. 4). See also *Liverpool & London & Globe Ins. Co. v. Nebraska Storage Warehouses*, 96 F. (2d) 30, 36 (C. C. A. 8).

Here, were we free to do so, we would say that, since of course Maggio no longer had possession, ~~the trustee did not~~ seek to have Maggio surrender goods or money he possessed, but sought, with the aid of a transparent fiction, to have the court, after a trial without a jury, punish him for a crime (*i. e.*, that of concealing assets or of a false oath in a bankruptcy proceeding)³ with the hope that such punishment would induce Maggio's close relatives and friends to put up the money. We would refer to Judge Mack's comment on the impropriety of thus coercing such relatives and friends.⁴ We would hold that a *turnover proceeding* may [fol. 43] *not, via a fiction, be substituted for a criminal prosecution so as to deprive a man of a basic constitutional right, the right of trial by jury.*⁵ We would note, too, that one consequence of the fiction is that the respondent may be twice punished for the same offense, since, if he is later indicted for violation of 11 U. S. C. A. § 52 (b), his imprisonment for contempt will not serve as a defense. We would add that nowhere in the Bankruptcy Act has Congress even intimated an intention to authorize such results, and that they stem solely from a judge-made gloss on the statute.

As Judge L. Hand observed in *Robbins v. Gottbetter*, 134 F. (2d) 843, 844 (C. C. A. 2), the Supreme Court has never decided in favor of the fictitious "presumption" here invoked. On the contrary, it has often ruled that a fiction must never be used to work injustice, or "to obscure the facts when they become important," or when the fiction is "unrelated to reality."⁶ True, the Supreme Court has several times denied certiorari as to our decisions which uti-

³ See 11 U. S. C. A. § 52 (b) (1) and (2).

⁴ *Freed v. Central Trust Co.*, 215 F. 873, 877 (C. C. A. 7).

⁵ Cf. Sanborn, J., in *In re Rosser*, 101 F. 562, 566 (C. C. A. 8).

⁶ *Curry v. McCannless*, 307 U. S. 357, 374; *Story, J.*, in *U. S. v. Nineteen Hundred and Sixty Bags of Coffee*, 8 Cranch 398, 415; *Holmes, J.*, in *Blackstone v. Miller*, 188 U. S. 189, 204; *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84, 92; *Liverpool, etc. Ins. Co. v. Orleans Assessors*, 221 U. S. 346, 354.

See discussion of fictions and cases cited in *Hammond-Knowlton v. U. S.*, 121 F. (2d) 192, 199, 200 (C. C. A. 2).

lized this particular "presumption," and did so with respect to our decision on the previous appeal in the instant case. But we have been admonished frequently that denial of certiorari has no precedential significance.

However, the decisions in this circuit sanctioning this "presumption" fiction⁷ constrained this court, on the pre-[fol. 44] vious appeal, to decide, without opinion, that the referee had correctly rested his finding on that "presumption," despite its glaring departure from what any reasonable person would believe were the actual facts.

With the turnover order once sustained, the contempt order necessarily followed. For, under *Oriel v. Russell*, 278 U. S. 358, the findings made in connection with the turnover order were res judicata in the contempt proceedings. That is to say, the judge, on June 5, 1945, had to accept it as true (1) that on August 9, 1943, Maggio still had possession of the merchandise taken in December 1941, or its proceeds, and also (2) that this possession continued until June 5, 1945 (i. e., continued for four years and five months after the taking in 1941), unless Maggio showed that, since August 9, 1943, he had been deprived of that possession or had in some other way become unable to comply with the turnover order. As Maggio made no such showing of an intervening change of facts, there was no error in the entry of the contempt order.

2. It is, however, urged as error that the trial judge ignored Maggio's seriously impaired health. We think it clear that the judge did ignore it. (The trustee says in his brief that, on a motion by Maggio for stay of commitment, the trustee showed the court a medical report from which it appeared that Maggio was not gravely ill; since the record does not contain that report or indicate in any way that the district judge saw or considered it, we must, of course, disregard it, for ours is not a trial court.) We assume, arguendo, that if the proceedings had been in form what they were in fact, i. e., a criminal action under 11

⁷ See, e. g., *In re Pinsky-Lapin Co.*, 98 F. (2d) 776 (C. C. A. 2); *Seligson v. Goldsmith*, 128 F. (2d) 977 (C. C. A. 2); *Robbins v. Gottbettee*, 134 F. (2d) 843 (C. C. A. 2); *Cohen v. Jeskowitz*, 144 F. (2d) 39 (C. C. A. 2); cf. *In the Matter of Union Fabrics, Inc.*, 153 F. (2d) 303 (C. C. A. 2); *Rosenblum v. Marinello*, 133 F. (2d) 674 (C. C. A. 3).

U. S. C. A. 52(b), we would have had the authority to consider whether, in the light of Maggio's grave heart ailment, the trial judge abused his discretion in jailing Maggio.

But, even so, Maggio's malady is surely irrelevant—unless we do away with the fictitious foundation of these pro-[fol. 45] ceedings. For, assuming, as the fiction requires, that, at the time of his commitment, he had the ability to comply with the turnover order, he could easily have avoided the effect of imprisonment on his health by immediately surrendering the merchandise to the trustee or by promptly drawing a check for \$17,500 to the trustee's order. On that assumption, the situation is precisely the same as if a man, who had been ordered by a court to execute a deed, sought, on a plea of ill-health, to avoid commitment for contempt for disobeying the order.

Although we know that Maggio cannot comply with the order, we must keep a straight face and pretend that he can, and must thus affirm orders which first direct Maggio "to do an impossibility, and then punish him for refusal to perform it."⁸ Our own precedents keep up from abandoning that pretense which, in this case, may well lead to inhumane treatment of Maggio and which, in other turnover cases, has brought about a revival of those evils of the debtors' prison which legislation like the Bankruptcy Act was supposed to abolish. See, Douglas (now Mr. Justice Douglas); *Bankruptcy*, 2 Encyc. of Soc. Sc. (1930) 449.⁹ It is an open secret that Maggio is being punished for a crime, but we are precluded from so acknowledging.

To eliminate the unfortunate results of the unreasonable fiction we have adopted, it will be necessary for the Supreme Court to grant certiorari and then to wipe out our more recent precedents. In this connection, it is well to note that the judges of this court have not been in accord concerning the wisdom of the fiction above discussed. In *Danish v. Sofranski*, 93 F. (2d) 424 (C. C. A. 2), this court, in an opinion by Judge Hand, all but abandoned the fiction. At the next term, however, in *In re Pinsky-Lapin & Co.*, 98 F. [fol. 46] (2d) 776 (L. Hand, A. N. Hand and Chase sitting), the Danish case was over-ruled; Judge L. Hand concurred

⁸ Sanborn, C. J., in *In re Rosser*, 101 F. 562, 566, 568.

⁹ See also Radin, *Debt*, 5 Encyc. Soc. Sc. (1931) 32, 37-38.

in the result but with a criticism of the reasoning. In *Seligson v. Goldsmith*, 128 F. (2d) 977 (C. C. A. 2), this court (L. Hand, Swan and Frank), in an opinion by Judge L. Hand, reluctantly adhered to the ruling in *Pinsky-Lapin & Co., supra*. In *Robbins v. Gottbetter*, 134 F. (2d) 843 (C. C. A. 2; L. Hand, A. N. Hand and Frank sitting), the opinion by Judge L. Hand stated that he and the writer of the present opinion were highly critical of the fiction but acquiesced in the previous ruling. In *Cohen v. Jeskowitz*, 144 F. (2d) 39 (C. C. A. 2; A. N. Hand, Chase and Frank), the writer of the present opinion concurred but again expressed agreement with Judge L. Hand's views.¹⁰ It should also be noted that a conflict between the Circuits now exists, since, in *Brune v. Fraidin*, 149 F. (2d) 325 (C. C. A. 4), the Fourth Circuit, in an excellent opinion by Judge Watkins,¹¹ has repudiated the "presumption" doctrine when carried to the extent required by our recent decisions, which decisions we feel obliged to follow in the instant case. [fol. 47] What we have said should make it plain that, under those decisions, the district judge was compelled to

¹⁰ Since then, in two cases decided without opinion, we stuck to the fiction; see *Zeitz v. Maggio*, 145 F. (2d) 241 (C. C. A. 2; L. H., Swan and Clark); *In the Matter of Union Fabrics, Inc.*, 153 F. (2d) 303 (C. C. A. 2; Swan, Clark and Frank).

¹¹ The court said, (p. 329): "A turnover order is not a money judgment saying that the bankrupt ought to have the merchandise or its proceeds. It is the court's command that he surrender, and necessarily presupposes ability to comply. Obviously the court should not order one to do something that was impossible and then punish him for failure to do it. It has been said that such procedure dangerously approaches near the line, if it does not overstep it, of imprisonment for debt. If the bankrupt has concealed and then dissipated assets of the estate, punishment should be sought under the provisions of the bankrupt law relating to making of false oaths or concealment of assets. The bankruptcy courts are invested with power to require bankrupts to surrender their property and to enforce obedience by attachment for contempt, but a power so drastic should be exercised only in a plain case and always with due regard to the constitutional rights of the citizen."

give no heed to those human considerations¹² which doubtless would have influenced him had Maggio been, in form, as he was in fact, convicted of a crime. In other words, Maggio is worse off than if he had been criminally prosecuted.

Affirmed.

Swan, P. J., concurs in the result.

[fol. 48] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND
CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of November one thousand nine hundred and forty-six.

Present: Hon. Learned Hand, Hon. Thomas W. Swan,
Hon. Jerome N. Frank, Circuit Judges.

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt;
JOSEPH F. MAGGIO, Appellant; RAYMOND ZEITZ, Trustee-
Appellee

Appeal from the District Court of the United States for the
Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

¹² An intimation to the contrary, in *In re Siegler*, 31 F. (2d) 972, 974 (C. C. A. 2), must be taken as dictum, since there we reversed an order refusing to adjudge the bankrupt in contempt.

[fol. 49] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re Luma Camera Service, Inc. Joseph F. Maggio, Appellant; Raymond Zeitz, Appellee. (31). Judgment. United States Circuit Court of Appeals, Second Circuit. Filed November 11th, 1946. Alexander M. Bell, Clerk.

[fol. 50] Clerk's Certificate to foregoing transcript omitted in printing.

(8865)

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[fol. 51] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1946

No. 967

ORDER ALLOWING CERTIORARI—Filed March 10, 1947.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter Max Schwartz, File No. 51,831, U. S. Circuit Court of Appeals, Second Circuit, Term No. 967, Joseph F. Maggio, Petitioner, vs. Raymond Zeitz as Trustee in Bankruptcy of Luma Camera Service, Inc. Petition for a writ of certiorari and exhibit thereto. Filed January 31, 1947. Term No. 967 O. T. 1946.

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